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Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Applications of	)	
	)	
Comcast Corp.,	)	
Time Warner Cable, Inc.	)	MB Docket No. 14-57
Charter Communications, Inc., and	)	
SpinCo	)	
	)	
For Consent to Transfer Control of	)	
Licenses and Authorizations	)	

ACCEPTED/FILED

AUG 26 2014

Federal Communications Commission
Office of the Secretary

American Cable Association

COMMENTS

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EXECUTIVE SUMMARY

In these comments, the American Cable Association ("ACA") demonstrates that the combination of the nation's two largest cable operators, Comcast Corp. ("Comcast") and Time Warner Cable Inc. ("TWC"), both of which have significant interests in video programming, and Comcast later divesting to and swapping systems with Charter Communications, Inc. ("Charter"), which also has attributable programming interests, will result in harm to competition and consumers, particularly in the multichannel video programming distribution ("MVPD") and programming markets. The program access remedies utilized in prior Commission transaction reviews involving similar combinations of programming and distribution assets are inadequate to address these public interest harms. Because these harms are so significant, and are not counterbalanced by public interest benefits, the Commission cannot approve the proposed combination without adopting specific and meaningful relief.

ACA has a substantial interest in this proceeding because its approximately 840 small and medium-sized member cable operators either acquire programming from Comcast or TWC, compete in the MVPD market with Comcast, TWC and Charter cable systems, or, in select instances, both acquire programming and compete in distribution. More specifically, today all ACA members transact, directly or indirectly, with the Applicants and their affiliates for distribution rights to consumers and access to broadcast and cable programming networks. These transactions include deals for carriage of "must have" programming, including NBC network broadcast programming aired on local owned and operated ("O&O") broadcast stations, Comcast and TWC regional sports networks ("RSNs"), and suites of NBCUniversal (NBCU) cable programming networks such as USA Network, CNBC, Golf Channel, Syfy, Bravo, E!, MSNBC, and other core programming. Further, dozens of ACA members compete directly with

Comcast, TWC and Charter cable systems, some in multiple markets – small companies going head-to-head with the nation's largest cable MVPDs.

The Comcast-TWC-Charter transaction involves companies with significant roles in both the downstream MVPD industry and the upstream video programming industry. While it has been observed that the "vast majority of mergers are either procompetitive and enhance consumer welfare or are competitively benign," the Comcast-TWC-Charter transaction is neither. ACA will demonstrate that the proposed transaction, if consummated, will have significant deleterious vertical and horizontal competitive effects.

Vertical Harm. The proposed integration of Comcast's valuable programming assets and TWC's distribution systems exacerbates the harm the Commission and the U.S. Department of Justice ("DOJ") found in the Comcast-NBCU merger by uniting substantial video programming and distribution assets. The Commission recognized that once joined, Comcast-NBCU would negotiate more aggressively relative to pre-transaction NBCU when selling NBCU content to Comcast's video distribution rivals because the integrated firm would take into account the possibility that any harm from failure or delay in reaching agreement would be offset to some extent by a benefit to Comcast, as reaching a higher price would raise the costs of Comcast's rivals. By improving Comcast-NBCU's bargaining position, the transaction would lead to higher programming costs for Comcast's video distribution rivals. Once it acquires cable systems from TWC and Charter, this very same harm will be magnified by the increased overlap of Comcast's territory with rival MVPDs, and will increase Comcast's incentives and ability to command higher programming fees from MVPDs that compete with Comcast. Charter's growth will inflict similar harms to its rival MVPDs.

The existing vertical harm will grow larger in two ways. First is the increased opportunity of attracting subscribers from rival MVPDs due to the increased number of homes passed by Comcast. Second is the increased profit of attracting new subscribers due to the efficiencies the Applicants claim will be created by the merger. The resulting fee increases may be substantially passed through to subscribers in the form of higher subscription fees. Additionally, vertical price effects will also be felt by Comcast's own subscribers in the form of increased prices as the combined entity profits from the sale of programming to rivals even if it loses some subscribers due to price increases, leading to widespread general public interest harm through increased prices.

Horizontal Harms. The transaction threatens two sets of horizontal harms. The first concerns the addition of TWC's RSNs in Los Angeles and New York to the vast array of programming offered by Comcast. The second concerns the increased bargaining power with respect to its programming that Comcast will attain by increasing its subscriber base from 21.1 million to up to 31.4 million video subscribers (to the extent Comcast negotiates on behalf of Bright House Networks and Midcontinent).

Horizontal Harm from the Combination of Comcast and TWC Programming Assets. This horizontal harm arises from the proposed transaction when key programming assets of Comcast and TWC are joined post-transaction into one powerful company. More specifically, today Comcast and TWC each own video programming assets. Comcast owns NBCU O&O stations, national cable programming networks and RSNs. TWC owns several RSNs. Through the acquisition of TWC, Comcast will acquire two RSNs in the two largest media markets and cities in the country, Lost Angeles and New York. By combining control of these assets, Comcast will have an increased incentive and ability to command higher prices for this programming, especially in markets where MVPDs distribute both a Comcast RSN and an NBC O&O, resulting in harm to MVPDs and consumers. The Commission has recognized that horizontal integration of programming assets gives a company greater bargaining power to extract higher rates from MVPDs in both the *Comcast-NBCU Order* and in its recent retransmission consent reform rulemaking. The result will be no different in this case.

Increased Horizontal Scale of Comcast. The proposed combination will also result in horizontal harm from an increase in Comcast's bargaining and purchasing power in programming markets. In the cable television industry, programmers traditionally offer volume discounts based on the number of subscribers an MVPD serves. Post-transaction, programmers will be negotiating with an MVPD that holds nearly one third of subscribers across the country. Prior to the transaction, Comcast was the largest MVPD in the country, and TWC the second largest cable operator – each able to command the best and most competitive rates from programmers. Post-transaction, Comcast will have increased bargaining power over these programmers and will have the ability to receive the lowest rates possible. Charter's growth will result in it receiving lower rates as well. Accordingly the disparity in programming fees paid by the largest cable operators compared to their small rivals will expand, and become more competitively troublesome. Comcast's and Charter's increased bargaining power will also lead programmers to recoup these losses from other MVPDs by charging them higher and less competitive prices. Further, by obtaining lower prices, Comcast will increase its profitability per subscriber, which will lead to an increase in the opportunity cost for Comcast to sell its programming to rival MVPDs, and, in turn, lead to higher Comcast programming costs for these MVPDs. ACA members will be threatened the most in these circumstances.

Harm in Advertising Markets. The proposed combination will also lead to public interest harms in the spot cable advertising market. Post-acquisition, Comcast will have increased control and leverage in the NCC, regional Interconnects and in spot cable advertising representation services. This increased control, across all aspects of the spot cable advertising market, will give Comcast another lever to raise the costs of its competitors and subsequently harm consumers.

Arbitration Conditions are Inadequate to Address Harms. Previous remedies utilized by the Commission, including baseball-style arbitration, are not adequate to alleviate the public interest harms raised by this combination, particularly for small and medium-sized MVPDs. In any baseball-style arbitration proceeding, small and mid-sized MVPDs are disadvantaged by multiple factors, including a lack of critical information and information imbalance in the arbitration process, the high fixed costs of the arbitration process, threat of retaliation from programmers and problems starting the process. These short-comings must be addressed in any remedial conditions imposed on the Applicants as a condition of grant of their license transfers.

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American Cable Association

COMMENTS

The American Cable Association ("ACA") submits these comments in response to the Public Notice issued by the Commission in the above captioned proceeding on July 18, 2014 seeking comment on applications filed by Comcast Corporation ("Comcast"), Time Warner Cable Inc. ("TWC"), Charter Communications, Inc. ("Charter") and SpinCo (collectively, "the Applicants") seeking consent to transfer control of various Commission licenses and other authorizations associated with a series of transactions that will vastly augment the size and reach of Comcast, the nation's largest cable operator through its absorption of TWC, the second largest operator, and significantly increase the size of Charter, the nation's fourth largest cable operator.[1] ACA maintains, and will demonstrate, that the transactions between and among the Applicants will, by increasing Comcast's total number of homes passed through its acquisition of TWC and Charter systems and by adding TWC's programming to Comcast's already prodigious suite of programming assets, adversely affect a majority of the multichannel video programming distributor ("MVPD") subscribers served by other distributors who compete against Comcast as well as harm Comcast's own customers, contrary to the public interest. Furthermore, the transaction will, by increasing both Comcast's and Charter's total numbers of subscribers served, increase their bargaining leverage with programmers and result in these companies lowering their overall programming costs. This outcome will further increase the disparity in the wholesale programming rates paid by these large cable operators and their smaller rivals. In these comments, which include an extensive economic analysis by Professor Gary Biglaiser, ACA describes these harms in detail and with evidentiary support, and provides a critique of the effectiveness of prior Commission remedial conditions to ameliorate these harms for smaller and medium-sized MVPDs.[2] Unless the Commission adopts robust relief to remedy the transactions' harms, these deals should not be approved.

[1] *Public Notice, Commission Seeks Comment on Applications of Comcast Corporation, Time Warner Cable Inc., Charter Communications, Inc., and SpinCo To Assign and Transfer Control of FCC Licenses and Other Authorizations*, MB Docket No. 14-57, DA 14-96 (rel. Jul. 10, 2014) ("Public Notice").

[2] *See* Gary Biglaiser, *The Harms of Comcast-TWC-Transaction* (August 25, 2014), attached hereto as Exhibit A ("Biglaiser").

I. INTRODUCTION

Because its approximately 840 small and medium-sized member cable operators either acquire programming from Comcast or TWC, compete in the MVPD market with Comcast, TWC and Charter cable systems, or, in select instances, both acquire programming and compete in distribution, ACA has a substantial interest in this proceeding. More specifically, today all ACA members transact, directly or indirectly, with the Applicants and their affiliates for distribution rights to consumers and access to broadcast and cable programming networks. These transactions include deals for carriage of "must have" programming, including NBC network broadcast programming aired on local owned and operated ("O&O") broadcast stations, Comcast and TWC regional sports networks ("RSNs"), and suites of NBCUniversal (NBCU) cable programming networks such as USA Network, CNBC, Golf Channel, Syfy, Bravo, E!, MSNBC, and other core programming. Further, dozens of ACA members compete directly with Comcast, TWC and Charter cable systems, some in multiple markets – small companies going head-to-head with the nation's largest cable MVPDs.

While it has been observed that the "vast majority of mergers are either procompetitive and enhance consumer welfare or are competitively benign," the Comcast-TWC-Charter transaction is neither.[3] ACA will demonstrate that the proposed transaction, if consummated, will have significant deleterious vertical and horizontal competitive effects. As a result of this transaction, Comcast will have an increased incentive and ability to extract supra-competitive prices for its video programming from other MVPDs and these rate increases will be

[3] Christine A. Varney, Merger Guideline Workshops, Third Annual Georgetown Law Global Antitrust Enforcement Symposium (September 22, 2009), available at: http://www.justice.gov/atr/public/speeches/250238.pdf.

substantially passed through to subscribers in the form of higher subscription fees. The combination of Comcast and TWC will exacerbate the vertical harms created through the merger of Comcast and NBCU by giving Comcast an increased and geographically-expanded subscriber base. Vertical price effects will also be felt by Comcast's own subscribers in the form of increased prices as the combined entity profits from the sale of programming to rivals even if it loses some subscribers due to price increases, leading to widespread general public interest harm through increased prices.

The transaction also risks two sets of horizontal harm. The first concerns the addition of TWC's RSNs in Los Angeles and New York to Comcast's vast array of high value programming, particularly its NBC O&Os in those markets. Comcast's acquisition of a second block of must have programming to add to its NBC O&O stations in the two largest cities and media markets in the country will give it increased incentive and ability to command supra-competitive prices by combining negotiations for its programming assets, particularly for retransmission consent and RSN carriage.[4]

The second horizontal harm arises from the increased economic power of a far larger Comcast. ACA believes that Comcast will have increased purchasing power and ability to command the best rates from programmers by growing from 21.1 to 31.4 million subscribers (to the extent Comcast negotiations on behalf of Bright House Networks and Midcontinent). And programmers will seek to recoup these losses from small and mid-size MVPDs. Charter's

[4] The Commission accepted the two separately owned broadcast station in the same DMA could extract higher prices than either could obtain by negotiating separately in its recent decision to prohibit joint negotiations as a per se violation of the duty to negotiate retransmission consent in good faith. *Amendment of the Commission's Rules Related to Retransmission Consent,* Report and Order and Further Notice of Proposed Rulemaking, MB Docket No. 10-71, (rel. Mar. 31, 2014), ¶ 6.

growth will have a similar affect. Comcast will also have increased control over the spot cable advertising and spot cable advertising representation markets, to the detriment of competition.

Previous remedies proposed by the Commission, including baseball-style arbitration, are not adequate to alleviate the harms raised by this combination, particularly for small and mid-sized MVPDs. In any baseball-style arbitration proceeding, small and mid-sized MVPDs are disadvantaged by multiple factors, including a lack of critical information and information imbalance in the arbitration process, the high fixed costs of the arbitration process, threat of retaliation from programmers and problems starting the process. Unless the Commission adopts robust relief to remedy the transactions' harms, these deals should not be approved.

In the following sections, the ACA will describe these harms in detail, providing evidence in support of their existence and magnitude.

II. STANDARD OF REVIEW

Under Section 310(d) of the Communications Act,[5] the Federal Communications Commission ("FCC" or "Commission") must determine whether the Applicants have demonstrated that the proposed assignment and transfer of control of certain FCC licenses and authorizations held by Comcast and TWC as part of the proposed transaction will serve "the public interest, convenience, and necessity."[6] In making this determination the Commission

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[5] 47 U.S.C. § 310(d).

[6] Section 310(d) of the Act, 47 U.S.C. § 310(d), requires that the Commission consider applications for transfer of Title III licenses under the same standard as if the proposed transferee were applying for licenses directly under Section 308 of the Act, 47 U.S.C. § 308. *See, e.g.,Applications of Comcast Corp., General Electric Co. and NBC Universal, Inc. for Consent to Assign Licenses and Transfer Control of Licensees, MB Docket No. 10-56*, Memorandum Opinion and Order, 26 FCC Rcd 4238, 4247, ¶ 22 (2011) ("*Comcast-NBCU Order*"); *Applications for Consent to the Transfer of Control of Licenses, XM Satellite Radio Holdings Inc., Transferor, To Sirius Satellite Radio Inc., Transferee, MB Docket No. 07-57,* Memorandum

must first assess whether the proposed transaction complies with the specific provisions of the Act, other applicable statutes, and the Commission's rules. If the proposed transaction would not violate a statute or rule, the Commission next must consider whether it could result in public interest harms by substantially frustrating or impairing the objectives or implementation of the Communications Act or related statutes.[7] The Commission then employs a balancing test weighing any potential public interest harms of the proposed transaction against any potential public interest benefits.[8] The Applicants bear the burden of proving, by a preponderance of the

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Opinion and Order, 23 FCC Rcd 12348, 12363, ¶ 30 (2008) ("*XM-Sirius Order*"); *News Corp. and DIRECTV Group, Inc. and Liberty Media Corp. for Authority to Transfer Control*, 23 FCC Rcd 3265, 3276, ¶ 22 (2008) ("*Liberty Media-DIRECTV Order*"); *Applications for Consent to the Assignment and/or Transfer of Control of Licenses Adelphia Communications Corporation, (and subsidiaries, debtors-in-possession), Assignors, to Time Warner Cable Inc. (subsidiaries), Assignees; Adelphia Communications Corporation, (and subsidiaries, debtors-in-possession), Assignors and Transferors, to Comcast Corporation (subsidiaries), Assignees and Transferees; Comcast Corporation, Transferor, to Time Warner Inc., Transferee; Time Warner Inc., Transferor, to Comcast Corporation, Transferee*, Memorandum Opinion and Order, 21 FCC Rcd 8203, ¶ 23 (2006) ("*Adelphia Order*"); *SBC Comm. Inc. and AT&T Corp. Applications for Approval of Transfer of Control*, 20 FCC Rcd 18290, 18300, ¶ 16 (2005) ("*SBC-AT&T Order*"); *Verizon Comm., Inc. and MCI, Inc. Applications for Approval of Transfer of Control*, 20 FCC Rcd 18433, 18443, ¶ 16 (2005) ("*Verizon-MCI Order*"); *General Motors Corporation and Hughes Electronics Corporation, Transferors, and The News Corporation Limited, Transferee*, MB Docket No. 03-124, Memorandum Opinion and Order, 19 FCC Rcd 473, 485, ¶ 18 (2004) ("*News Corp.-Hughes Order*"). *See also SkyTerra Communications, Inc., Transferor and Harbinger Capital Partners Funds, Transferee Applications for Consent to Transfer of Control of SkyTerra Subsidiary, LLC,* IB Docket No. 08- 184 et al., *Memorandum Opinion and Order and Declaratory Ruling,* DA 10-535, ¶ 10 (rel. Mar. 26, 2010).

[7] *See, e.g., Comcast-NBCU Order*, 26 FCC Rcd at 4247, ¶ 22; *XM-Sirius Order*, 23 FCC Rcd at 12364, ¶ 30; *Liberty Media-DIRECTV Order*, 23 FCC Rcd at 3276-77 ¶ 22; *SBC-AT&T Order*, 20 FCC Rcd at 18300, ¶ 16; *Verizon-MCI Order*, 20 FCC Rcd at 18443, ¶ 16.

[8] *See, e.g., Comcast-NBCU Order*, 26 FCC Rcd at 4247, ¶ 22; *XM-Sirius Order*, 23 FCC Rcd at 12364, ¶ 30; *Liberty Media-DIRECTV Order*, 23 FCC Rcd at 3277, ¶ 22; *SBC-AT&T Order*, 20 FCC Rcd at 18300, ¶ 16; *Verizon-MCI Order*, 20 FCC Rcd at 18443, ¶ 16; *News Corp.-Hughes Order*, 19 FCC Rcd at 483, ¶ 15.

evidence, that the proposed transaction, on balance, will serve the public interest.[9] If the Commission is unable to find that the proposed transaction serves the public interest for any reason, or if the record presents a substantial and material question of fact, the application must be designated for hearing.[10]

The Commission's public interest evaluation necessarily encompasses the "broad aims of the Communications Act,"[11] which include, among other things, "a deeply rooted preference for preserving and enhancing competition in relevant markets, accelerating private-sector deployment of advanced services, ensuring a diversity of information sources and services to the public, and generally managing spectrum in the public interest."[12] The Commission's public interest analysis may also entail assessing whether the transaction will affect the quality of

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[9] *See, e.g., Comcast-NBCU Order*, 26 FCC Rcd at 4247, ¶ 22; *XM-Sirius Order*, 23 FCC Rcd at 12364, ¶ 30; *Liberty Media-DIRECTV Order*, 23 FCC Rcd at 3277 ¶ 22; *SBC-AT&T Order*, 20 FCC Rcd at 18300, ¶ 16; *Verizon-MCI Order*, 20 FCC Rcd at 18443, ¶ 16; *Application of EchoStar Communications Corporation (a Nevada Corporation), General Motors Corporation, and Hughes Electronics Corporation (Delaware Corporations) (Transferors) and EchoStar Communications Corporation (a Delaware Corporation) (Transferee)*, CS Docket No. 01-348, Hearing Designation Order, 17 FCC Rcd 20559, 20574, ¶ 25 (2002) ("*EchoStar-DirecTV Order*").

[10] 47 U.S.C. § 309(e); *see also Comcast-NBCU Order*, 26 FCC Rcd at 4248, ¶ 22; *XM-Sirius Order*, 23 FCC Rcd at 12364, ¶ 30; *Liberty Media-DIRECTV Order*, 23 FCC Rcd at 3277, ¶ 22; *Adelphia Order*, 21 FCC Rcd at 8217-18_¶ 23; *SBC-AT&T Order*, 20 FCC Rcd at 18300, ¶ 16; *Verizon-MCI Order*, 20 FCC Rcd at 18443, ¶ 16; *EchoStar-DirecTV Order*, 17 FCC Rcd at 20574, ¶ 25.

[11] *See, e.g., Comcast-NBCU Order*, 26 FCC Rcd at 4248, ¶ 23; *XM-Sirius Order*, 23 FCC Rcd at 12364, ¶ 31; *Liberty Media-DIRECTV Order*, 23 FCC Rcd at 3277 ¶ 23; *News Corp.-Hughes Order*, 19 FCC Rcd at 483, ¶ 16; *EchoStar-DIRECTV Order*, 17 FCC Rcd at 20575, ¶ 26.

[12] *See* Telecommunications Act of 1996, Pub. L. No. 104-104, § 706, 110 Stat. 56, 153 ("*1996 Act*"), *codified at* 47 U.S.C. § 157; 47 U.S.C. §§ 254, 332(c)(7); *1996 Act*, Preamble; *Comcast-NBCU Order*, 26 FCC Rcd at 4248, ¶ 23; *XM-Sirius Order*, 23 FCC Rcd at 12365, ¶ 31; *Liberty Media-DIRECTV Order*, 23 FCC Rcd at 3277-78, ¶ 23.

communications services or will result in the provision of new or additional services to consumers.[13] In conducting this analysis, the Commission may consider technological and market changes as well as trends within the communications industry, including the nature and rate of change.[14]

The Commission's competitive analysis, which forms an important part of the public interest evaluation, is informed by, but not limited to, traditional antitrust principles.[15] The Commission and the DOJ each have independent authority to examine the competitive impacts of proposed communications transactions involving transfers of Commission licenses, but the standards governing the Commission's competitive review differ somewhat from those applied by the DOJ.[16] Like the DOJ, the Commission considers how a transaction will affect competition by defining a relevant market, looking at the market power of incumbent competitors, and analyzing barriers to entry, potential competition and the efficiencies, if any, that may result from the transaction. The DOJ's review, however, focuses on whether a

[13] *See, e.g., Comcast-NBCU Order*, 26 FCC Rcd at 4248, ¶ 23; *XM-Sirius Order*, 23 FCC Rcd at 12365, ¶ 31; *Liberty Media-DIRECTV Order,* 23 FCC Rcd at 3277-78, ¶ 23.

[14] *See, e.g., Comcast-NBCU Order*, 26 FCC Rcd at 4248, ¶ 23; *XM-Sirius Order*, 23 FCC Rcd at 12365, ¶ 31; *Liberty Media-DIRECTV Order,* 23 FCC Rcd at 3277-78, ¶ 23.

[15] *See, e.g., Comcast-NBCU Order*, 26 FCC Rcd at 4248, ¶ 24; *XM-Sirius Order*, 23 FCC Rcd at 12365, ¶ 32; *Liberty Media-DIRECTV Order,* 23 FCC Rcd at 3278, ¶24; *Adelphia Order,* 21 FCC Rcd at 8218, ¶ 25; *News Corp.-Hughes Order*, 19 FCC Rcd at 484, ¶ 17; *EchoStar-DIRECTV Order*, 17 FCC Rcd at 20575, ¶ 27.

[16] *See, e.g., Comcast-NBCU Order*, 26 FCC Rcd at 4248, ¶ 24; *XM-Sirius Order*, 23 FCC Rcd at 12365, ¶ 32; *Liberty Media-DIRECTV Order,* 23 FCC Rcd at 3278, ¶ 24; *Verizon-MCI Order*, 20 FCC Rcd at 18444, ¶ 18; *SBC-AT&T Order*, 20 FCC Rcd at 18302 ¶ 18. *See also Satellite Business Systems*, 62 FCC 2d 997, 1088 (1977), *aff'd sub nom. United States v. FCC*, 652 F.2d 72 (D.C. Cir. 1980) (*en banc*); *Northern Utilities Service Co. v. FERC*, 993 F.2d 937, 947-48 (1st Cir. 1993) (public interest standard does not require agencies "to analyze proposed mergers under the same standards that the Department of Justice . . . must apply").

transaction may substantially lessen competition or tend to create a monopoly.[17] Under the Commission's review, the Applicants must show that the transaction affirmatively will serve the public interest; otherwise the application is set for hearing. Whereas the DOJ's review is also limited solely to an examination of the competitive effects of the acquisition, without reference to other public interest considerations,[18] the Commission's competitive analysis under the public interest standard is somewhat broader.

The Commission's analysis recognizes that a proposed transaction may lead to both beneficial and harmful consequences.[19] For instance, combining assets may allow a firm to reduce transaction costs and offer new products, but it may also create market power, create or enhance barriers to entry by potential competitors, and create opportunities to disadvantage rivals in anticompetitive ways.[20] The Commission's public interest authority enables it, where appropriate, to impose and enforce transaction-related conditions that ensure that the public interest is served by the transaction.[21]

Section 303(r) of the Communications Act authorizes the Commission to prescribe restrictions or conditions not inconsistent with law that may be necessary to carry out the

[17] 15 U.S.C. § 18.

[18] *See, e.g., XM-Sirius Order*, 23 FCC Rcd at 12366, ¶ 32.

[19] *See, e.g., Comcast-NBCU Order*, 26 FCC Rcd at 4249, ¶ 25; *XM-Sirius Order*, 23 FCC Rcd at 12366, ¶ 33; *Adelphia Order*, 21 FCC Rcd 8219, ¶ 25; *SBC-AT&T Order*, 20 FCC Rcd at 18302, ¶ 18; *Verizon-MCI Order*, 20 FCC Rcd at 18444-45, ¶ 18.

[20] *See, e.g., XM-Sirius Order*, 23 FCC Rcd at 12366, ¶ 33; *Liberty Media-DIRECTV Order*, 23 FCC Rcd at 3278-79, ¶ 25; *Adelphia Order*, 21 FCC Rcd 8219, ¶ 25.

[21] *See, e.g., Comcast-NBCU Order*, 26 FCC Rcd at 4249, ¶ 25; *XM-Sirius Order*, 23 FCC Rcd at 12366, ¶ 33; *Liberty Media-DIRECTV Order*, 23 FCC Rcd at 3279, ¶ 26.

provisions of the Act.[22] Indeed, unlike the role of antitrust enforcement agencies, the Commission's public interest authority enables it to rely upon its extensive regulatory and enforcement experience to impose and enforce conditions to ensure that the transaction will yield overall public interest benefits.[23] Further, the Commission has held that it will impose conditions to confirm specific benefits or remedy specific harms likely to arise from the transaction and that are related to the Commission's responsibilities under the Act and related statutes.[24]

For the reasons explained below, on balance, the proposed transaction threatens significant public interest harms that are not outweighed by the projected public interest benefits of the combination. Accordingly, should the Applicants fail to offer means of addressing these threatened harms, the Commission must consider the imposition of conditions, beyond those imposed in previous transactions, to ensure that the transaction will be, on balance, consistent with the public interest.

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[22] 47 U.S.C. § 303(r); *see also Comcast-NBCU Order*, 26 FCC Rcd at 4249, ¶ 25; *XM-Sirius Order*, 23 FCC Rcd at 12366, ¶ 33; *Liberty Media-DIRECTV Order,* 23 FCC Rcd at 3279, ¶ 26; *U.S. v. Southwestern Cable Co*., 392 U.S. 157, 178 (1968) (holding that section 303(r) permits the Commission to order a cable company not to carry broadcast signal beyond station's primary market); *United Video, Inc. v. FCC*, 890 F.2d 1173, 1182-83 (D.C. Cir. 1989) (affirming syndicated exclusivity rules adopted pursuant to section 303(r) authority). Similarly, Section 214(c) of the Act authorizes the Commission to attach to the certificate "such terms and conditions as in its judgment the public convenience and necessity may require." 47 U.S.C. § 214(c); *see also SBC-AT&T Order*, 20 FCC Rcd at 18303 ¶ 19; *Verizon-MCI Order*, 20 FCC Rcd at 18445, ¶ 19.

[23] *See, e.g.*, *Comcast-NBCU Order*, 26 FCC Rcd at 4249, ¶ 25; *XM-Sirius Order*, 23 FCC Rcd at 12366, ¶ 33; *Liberty Media-DIRECTV Order,* 23 FCC Rcd at 3279 ¶ 26; *News Corp.-Hughes Order*, 19 FCC Rcd at 477, ¶ 5; *see also Schurz Communications, Inc. v. FCC*, 982 F.2d 1043, 1049 (7th Cir. 1992) (discussing Commission's authority to trade off reduction in competition for increase in diversity in enforcing public interest standard).

[24] *See, e.g.*, *Comcast-NBCU Order*, 26 FCC Rcd at 4249, ¶ 25; *Liberty Media-DIRECTV Order,* 23 FCC Rcd at 3279 ¶ 26; *SBC-AT&T Order*, 20 FCC Rcd at 18303, ¶ 19; *Verizon-MCI Order*, 20 FCC Rcd at 18445, ¶ 19.

III. THE PROPOSED TRANSACTION THREATENS SERIOUS PUBLIC INTEREST HARMS

A. The Transaction Unites Substantial Video Programming and Distribution Assets.

The Comcast-TWC-Charter deal involves companies with significant roles in both the downstream video distribution (MVPD) industry, and the upstream video programming industry, which provides this programming to the MVPDs. Comcast is a media and technology giant with two primary businesses – Comcast Cable and NBCU. Comcast Cable today provides video, broadband Internet and other services and technologies through cable systems which serve approximately 21.1 million video customers. Comcast Cable also provides local, regional and national advertising services through Comcast Spotlight. Comcast Spotlight provides these services in approximately 80 markets. Comcast is also an owner of NCC Media, which represents national spot advertising sales across the country.

NBCU, which is owned and controlled by Comcast, operates the NBC and Telemundo broadcast television networks, including ten local O&O NBC television stations and 17 local O&O Telemundo stations. NBCU's cable national cable networks include Bravo, CNBC, E!, Esquire Network, Golf Channel, MSNBC, NBC Sports Network, Oxygen, Syfy, and USA Network, among others. Several regional sports networks (RSNs) are also part of NBCU's cable programming offerings, including RSNs in Houston, Chicago, Philadelphia, New England, and California, among others.

TWC also provides video, broadband Internet and other services and technologies through cable systems across the country. TWC's cable systems serve approximately 11.4 million video customers. TWC also owns and manages a number of local news channels, local lifestyle channels, local sports channels and a number of RSNs. TWC also sells video advertising to local, regional and national customers. Along with Comcast and Cox, TWC is also an owner of NCC Media.

Charter Communications is the fourth-largest domestic cable operator. The company also provides broadband Internet and voice services. It has approximately 4.2 million residential video customers. Liberty Media has held a controlling interest in Charter since early 2013. Because media executive John Malone holds a substantial interest in Charter through his stake in Liberty Media, and in cable programmers Discovery Communications and Starz, the Discovery Communications and Starz networks are considered attributable to Charter pursuant to the Commission's attribution rules.[25] Popular networks deemed attributable to Charter under FCC rules include Discovery Channel, TLC, Animal Planet, The Oprah Winfrey Network, and Starz.

In the two proposed interrelated transactions (referred to herein as "transaction"), Comcast will acquire 100 percent of TWC's equity and its 11.4 million customers. Comcast will then divest TWC systems serving approximately 1.5 million existing subscribers directly to Charter; (2) Comcast and Charter will transfer assets, respectively serving approximately 1.5 million existing TWC customers and 1.6 million Charter customers, thereby enhancing the geographic clustering of both companies; and (3) Comcast will form and spin off to its shareholders a new, independent, publicly-traded company ("SpinCo") that will operate systems

[25] *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, Fifteenth Report*, MB Docket No. 12-203 (rel. Jul. 22, 2013), Appendix B, National Programming Services, Table B-1 (listing Liberty Media-affiliated programming networks).

serving approximately 2.5 million existing Comcast customers. Charter will acquire a one-third interest in SpinCo's equity, and enter into a services agreement with it.[26]

Thus, the proposed transaction involves both a horizontal combination of programming assets from Comcast and TWC and a vertical integration of these assets with Comcast, TWC and Charter distribution assets. The Commission has previously found it necessary to impose additional transaction-specific safeguards as conditions for approving vertical transactions between MVPDs and video programing networks. The record in those proceedings, including most recently the Comcast-NBCU proceeding, "supported allegations that the vertical integration of certain video programming networks with a particular MVPD would harm competition and enhance the integrated MVPD's market power despite the Commission's [program access] rules."[27] The categories of such "marquee" or "must have" programming the Commission recognized with respect to Comcast "includes a broad portfolio of national cable programming in addition to RSN and local broadcast programming."[28] The Commission found that "such programming is important to Comcast's competitors and without good substitutes from other sources;" loss of access to the programming would likely cause other MVPDs to lose subscribers, and, most importantly, that "the transaction will improve Comcast-NBCU's bargaining position, leading to an increase in programming costs for Comcast's video distribution rivals."[29] The

[26] Under the agreement, SpinCo has the right to have Charter purchase programming on its behalf.

[27] *Comcast-NBCU Order*, 26 FCC Rcd at 4253-4254, ¶ 35.

[28] *Comcast-NBCU Order*, 26 FCC Rcd at 4254, ¶ 36.

[29] *Comcast-NBCU Order*, 26 FCC Rcd at 4254-4255, ¶¶ 36, 37. The Commission had previously recognized that ownership of local broadcast television stations by one of the top four national broadcast networks conveyed "significant market power." *News Corp.-Hughes Order*,

Commission's findings are echoed by those of the U.S. Department of Justice ("DOJ") which similarly found that by acquiring control over NBCU programming, Comcast would gain significant market power and new incentives for engaging in discriminatory practices against downstream rivals through its "control of an important portfolio of current and library content" that rivals need to be in the business.[30]

Access to such "must have" programming by other MVPDs is at issue in the instant transaction as well. The combination of Comcast and TWC must have programming assets with the expanded reach of Comcast's cable systems post-transaction will exacerbate the competitive harms of the Comcast-NBCU merger, not only for MVPDs competing directly with Comcast and Charter, but for Comcast's own subscribers. The Applicants claim that the proposed transaction

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19 FCC Rcd at 565, ¶ 201 ("We find that News Corp. currently possesses significant market power in the DMAs in which it as the ability to negotiate retransmission consent agreements on behalf of local broadcast television stations.").

[30] Competitive Impact Statement at 23-27, filed in *United States v. Comcast Corp.*, Civ. Action No. 1:11-cv-00106 (D.D.C. dated Jan. 18, 2011), http://www.justice.gov/atr/cases/f266100/266158.pdf, ("Post-transaction, the [Joint Venture] would gain increased bargaining leverage sufficient to negotiate higher prices or withhold NBCU content from Comcast's MVPD competitors. Comcast's rival distributors would have to pay the increased prices or not carry the programming. In either case, the MVPDs likely would be less effective competitors to Comcast, and Comcast would be able to delay or otherwise substantially impede the development of [online video distributors] as alternatives to MVPDs. All of these activities could have substantial anticompetitive effect on consumers and the market. Because Comcast would face less competition from other video programming distributors, it would be less constrained in its pricing decisions and have a reduced incentive to innovate. As a result, consumers likely would be forced to pay higher prices to obtain their video content or receive fewer benefits of innovation. They would also have fewer choices in the types of content and providers to which they would have access, and there would be lower levels of investment, less experimentation with new models of delivering content, and less diversity in the types and range of product offerings."); Complaint at¶¶ 47-51, 59-60 filed in *United States v. Comcast Corp.*, Civ. Action. 1:11-cv-00106 (D.D.C. dated Jan. 18, 2011), http://www.justice.gov/atr/cases/f266100/266158.pdf (finding proposed transaction will likely eliminate or lessen competition in sale of video programming and increase prices for video programming distribution services while decreasing innovation and quality of these services)..

does not raise *any* competition concerns with respect to their increased buying power over programming or their market power in local television and cable programming markets. Specifically, they argue that "there is no plausible theory of competitive harm arising from the horizontal elements of the transaction" and "no plausible theory that the transaction will facilitate 'foreclosure' or other exclusionary conduct."[31] This implausibly narrow view of the potential harms posed by the transaction should be given little credence.

B. The Proposed Comcast-TWC-Charter Transaction Will Increase the Vertical Harms Caused by the Comcast-NBCU Merger.

The Commission has long recognized that vertical integration between MVPDs and programmers can result in competitive harms that are not remedied by the program access rules and therefore must be addressed through transaction-specific remedial conditions.[32] As discussed above, the Commission came to a similar conclusion in the *Comcast-NBCU Order* where it noted that the combination of Comcast distribution and programming assets and NBCU programming assets gives Comcast an incentive and ability to charge competing MVPDs higher prices for its programming. There, the Commission was concerned both that Comcast would withhold programming from other distributors and that it would raise the prices for such programming, finding, with respect to the latter form of harm that:

> Comcast-NBCU will negotiate more aggressively relative to pre-transaction NBCU when selling NBCU content to Comcast's video distribution rivals. Unlike the pre-transaction NBCU, the integrated firm will take into account the possibility that any harm from failure or delay in reaching agreement would be offset to some extent by a benefit to Comcast, as reaching a higher price would

[31] *Applications of Comcast Corp. and Time Warner Cable Inc. for Consent to Transfer Control of Licenses and Authorizations*, Applications and Public Interest Statement, at 138-169 (filed Apr. 8, 2014) ("Application").

[32] *News Corp.-Hughes Order*, 19 FCC Rcd at 508, ¶ 71.

> raise the costs of Comcast's rivals. As a result, the transaction will improve Comcast-NBCU's bargaining position, leading to an increase in programming costs for Comcast's video distribution rivals.[33]

This transaction exacerbates the very harm the Commission and the DOJ found posed by the Comcast-NBCU merger by vertically integrating Comcast's valuable programming assets with TWC's distribution systems, creating enhanced vertical integration beyond that created by the Comcast-NBCU transaction. The specific vertical harm arises from the increased overlap of Comcast's service territory with that of rival MVPDs. The transaction will increase Comcast's incentive and ability to use its programming assets to raise fees and harm competing MVPDs and their subscribers.

In the accompanying analysis, Professor Biglaiser demonstrates how the existing vertical harm grows larger in two ways. First is the increased opportunity of attracting subscribers from rival MVPDs due to the increased number of homes passed by Comcast as a result of its cable system acquisition. Second is the increased profit of attracting new subscribers due to the efficiencies created by the merger. "The higher opportunity cost for selling its programming due to the merger gives Comcast a greater incentive to raise the prices for its programming to rival MVPDs."[34]

Professor Biglaiser uses the bargaining framework employed by other economists and the Commission in its analysis of the harms of the Comcast-NBCU transaction. This framework computes the opportunity cost that Comcast incurs by selling programming to a rival MVPD. "A higher opportunity cost for providing programming to a rival provides an incentive for Comcast

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[33] *Comcast-NBCU Order*, 26 FCC Rcd at 4254-4255, ¶ 37.

[34] Biglaiser at 5.

to raise its price for that programming. This increased cost to rival MVPDs will be passed on, in whole or in part, to the rival MVPD's subscribers in terms of higher cable fees."[35]

Professor Biglaiser's analysis is also based on the standard discrete choice model:

> When consumers are facing a decision about what product to purchase, they evaluate the intrinsic qualities of the products and the price of each product in their feasible set of choices. They then choose the product attribute/price combination that maximizes their utilities. A product's quality has features where all consumers may agree about the product's quality such as the reliability of the product, and features where consumers may have different rankings for the product's quality, such as the program offering. They first type of features are known as vertical features, while the second are known as horizontal or idiosyncratic features. ... When consumers are making their decision about which MVPD to subscribe to, they evaluate the offering's vertical and horizontal features or qualities and the prices for each service. An MVPD will have a larger market than an MVPD that offers a lower value for a large number of consumers.[36]

To evaluate the additional vertical harm caused by this acquisition, Professor Biglaiser looked at the competitive overlap of Comcast with both larger MVPDs and with ACA's smaller members.[37] The overlap with ACA members was computed by using as a proxy the post-transaction overlap with members of the National Cable Television Cooperative ("NCTC"), a buying group through which member companies purchase their programming and related services.[38] As a buying group, NCTC negotiates standardized master agreements with

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[35] Biglaiser at 7.

[36] Biglaiser at 9.

[37] This competitive overlap is calculated using the membership of the National Cable Television Cooperative, but excluding its four largest members who rarely participate in NCTC deals. See Declaration of Rick Fickle, President and Chief Executive Officer, NCTC, ¶¶ 5-6, attached hereto as Exhibit B ("Fickle Declaration").

[38] Fickle Declaration, ¶¶ 3-4. Mr. Fickle explains that NCTC is a non-profit cooperative purchasing organization for its member companies that own and operate cable systems throughout the United States and its territories. NCTC currently has approximately 910 member

programmers and technology vendors. It acts as an interface between the vendor and individual MVPDs so that the vendor can deal with a single entity for purposes of negotiating contracts, determining technical standards, billing for payments, collecting payments, and marketing.[39] NCTC has master agreements with the vast majority of cable networks. Almost all small and medium-sized MVPDs are members of the NCTC and purchase a substantial share of the programming they distribute through the NCTC; the largest four members of the NCTC are not actively engaged in NCTC agreements aside from a few minor programming agreements and therefore are considered by NCTC to be inactive.[40] Apart from the four largest, many of NCTC's active members compete across the country with Comcast, TWC, and Charter.[41]

Professor Biglaiser shows that the competitive overlap with large MVPDs who currently compete with Comcast or will compete with Comcast after the deal increases. He correspondingly shows that Comcast's assumption of TWC's relationship with BHN will also lead to a greater competitive overlap. The combined change in competitive overlap will result in higher prices and harm to these MVPDs and their consumers. The competitive overlap with smaller operators who purchase a substantial share of their programming through NCTC will also {{[redacted].}}[42] The following chart highlights Professor Biglaiser's findings:

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companies serving millions of multichannel video programming distributor (MVPD) subscribers. Members range in size from the largest serving a few million to the smallest serving "tens of" subscribers, with a median size of fewer than 1,500 subscribers.

[39] Fickle Declaration, ¶ 4.

[40] Fickle Declaration, ¶ 5.

[41] Fickle Declaration, ¶ 6.

[42] Biglaiser at 19.